UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-FIVE

SHEEHY ENTERPRIZES, INC.,	)	
	)	
and	)	Case No.: 25-CA-30583
	)	
LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, STATE OF INDIANA DISTRICT COUNCIL, a/w LABORERS' INTERNATIONAL UNION OF NORTH AMERICA	)	

PETITIONER/CROSS-RESPONDENT SHEEHY ENTERPRIZES INC. MOTION FOR RECONSIDERATION AND REOPENING OF THE RECORD BY THE NATIONAL LABOR RELATIONS BOARD

Petitioner/Cross-Respondent, Sheehy Enterprizes, Inc. ("("Sheehy" or the "Company") by counsel, under 29 CFR 102.48, respectfully moves the National Labor Relations Board ("NLRB" or "the Board") to allow it to submit supplemental exceptions and a supplemental brief by Sheehy for the following exceptional reasons.

First, the Board has failed to consider the import of *A & L Underground* 302 N.L.R.B. 467, 468 (1991) and *NLRB v. Jerry Durham Drywall*, 974 F.2d 1000, (8th Cir., 1992). In both of these cases the Board has held that in an 8(f) Agreement, if there are no actions in concert with the Collective Bargaining Agreement for a period of six months, the CBA is considered to have been repudiated, which takes it out of the purview of the NLRB. This is not a n affirmative defense, but a Board and Court ruling that the contract is considered repudiated if no action is taken. This issue must be re-heard.

Also, the original decision by the Board, the decision was made by a two (2) person

panel. *Sheehy Enterprizes, Inc., v. NLRB*, 353 NLRB No. 84 (2009) and following its interpretation of the Supreme Court's Decision in *New Process Steel, L. P. v. Nat'l Labor Relations Board*, No. 08-1457 (U.S. 2010), the Seventh circuit then issued a remand to the National Labor Relations Board. ("Board"). (*Sheehy Enterprizes, Inc., v. NLRB*, 353 NLRB No. 84 (2009), and in *Sheehy Enterprizes, Inc., v. National Labor Relations Board,* 602 F.3d 839 (7th Cir. 2010), and in *Sheehy Enterprizes, Inc., v. NLRB*, 353 NLRB No. 84 (2009)), The second decision of the Board simply affirmed Sheehy I. In addition, Sheehy has reason to believe the Board had already returned the file to the NLRB with Member Becker not having reviewed the record in any manner. In addition, Member Becker should have recused himself because of his long history of representing the Laborers, who filed the original Charge in this case.. Therefore. for these and the following reasons, Sheehy's motion should be granted and it should be allowed to submit additional exceptions and a revised brief,

To not allow reconsideration would be a severe abrogation of justice, particularly since the original charge was filed nearly four (4) years earlier, thus making much of the remedy beyond the Boards' remedy under the six-month requirement of Section of the Act. In the instant case, Sheehy, even though it had very little resources, acted in good faith by appealing the decision of the ALJ to the two-person Board and then to the Court of Appeals and the Board responded by cross-petitioning for enforcement of its two (2) person decision, the meaning among the Circuits being split.

Now, the Board retried Sheehy before the same two persons who made the earlier decision plus one (1) more member, without having the record when it was obvious what the decision of the original two (2) members would be. In addition, upon information and belief, the Record had been returned to the Agency and Member Becker did not have the opportunity to

review the record. Without seeking further information from Sheehy, it was very unlikely that those two (2) members would admit further error and reverse their earlier decision. Sheehy also should be able to seek its attorney's fees and costs through the Equal Access of Justice Act.

Further, the Board needs to consider whether it was acting ultra vires, as well as defying res judicata and collateral estoppel. As this the seventh circuit stated in *Krilich:*

> After SWANCC was issued by the Supreme Court, Krilich brought the present motion in federal district court, arguing that, under SWANCC, the waters affected by the Consent Decree are not subject to the EPA's authority under the CWA. Therefore, Krilich reasoned, the execution and enforcement of the Consent Decree by the EPA is an ultra vires act and the Consent Decree was void ab initio. Krilich identified three bases for the district court's authority to vacate or modify the Decree: the express reservation-of jurisdiction clause contained in Paragraph 2 of the Consent Decree, the court's inherent power to modify its judgments, and Rule 60(b)(5) in light of a change in the law, namely, the SWANCC decision. *United States v. Krilich*, 303 F.3d 784 (7th Cir. 09/09/2002)

Similarly, the initial decision of the two (2) person Board, and the cross-petition for enforcement of the petition of the Board for enforcement was also an ultra vires act. The Board's initial decision and its petition for enforcement was void ab initio and should be re-heard at the least. The Seventh Circuit, in *Krilich,* identified three bases for the court's authority to vacate or modify a Decree: the express reservation-of-jurisdiction of the Court, the court's inherent power to modify its judgments, and Rule 60(b)(5) in light of a change in the law, namely, the *New Process Steel* decision. Id.

Finally, if the Board does not allow the aforementioned re-hearing, as the Supreme Court stated in *New Process Steel,* any further action by the Board would be barred by res judicata and collateral estoppel.

> "Res judicata precludes a party from raising even those issues it failed to raise in a prior action, but only if the issue could have been raised."); *Washam v. J.C. Penney Co.*, 519 F. Supp. 554, 558-59 (D. Del. 1981

Martin v Garman Construction Co., 945 F.2d 1000 (7th Cir. 1991)

In addition, this Case was filed nearly three (3) years since repudiated by Sheehy. Again, under *A & L Underground*, the Board found that an 8(f) CBA is repudiated if the Company or the Union takes no action in concert with the CBA for a period of six months. In the Sixth Circuit, makes the same finding. Id.

In the instant case, it is obvious the Board was aware of the risks of utilizing a two (2) person Board. The Board and the Seventh Circuit then decided, knowing of the potential risk involved, to remand the two (2) person Board and now Sheehy seeks re-consideration to correct these numerous errors.

Bruce F. Mills
Attorney for Plaintiff-Appellant

Respectfully submitted,

Bruce F. Mills (#24738-49)
B.F. MILLS & ASSOCIATES
11715 Fox Road, Suite 400-109
Indianapolis, IN 46236
(317) 318-5286
BFMills1@aol.com

Counsel for Sheehy Enterprizes, Inc

CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2010 a copy of the foregoing document was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system and/or served by first-class, United States mail, postage prepaid:

Linda Dreeben, Esq.
Fred B. Jacob, Esq.
Richard A. Cohen, Esq.
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570

Rik Lineback, Regional Director
National Labor Relations Board
Region 25
Room 238, Minton-Capehart Federal Building
575 North Pennsylvania Street
Indianapolis, IN 46204

Neil E. Gath, Esq.
Fillenwarth Dennerline Groth & Towe
429 E. Vermont, Suite 200
Indianapolis, IN 46202

_____
Bruce F. Mills

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Sheehy Enterprizes, Inc. *and* Laborers' International Union of North America, State of Indiana District Council, a/w Laborers' International Union of North America. Case 25–CA–30583

August 12, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS SCHAUMBER AND BECKER

On January 30, 2009, the two sitting members of the Board issued a Decision and Order in this proceeding, which is reported at 353 NLRB No. 84 (2009).[1] Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the Seventh Circuit, and the General Counsel filed a cross-petition for enforcement. On April 20, 2010, the court of appeals denied the Respondent's petition for review and granted the General Counsel's cross-petition for enforcement. 602 F.3d 839. On June 17, 2010, the United States Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635, holding that under Section 3(b) of the Act, in order to exercise the delegated authority of the Board, a delegee group of at least three members must be maintained. Thereafter, on July 21, 2010, the court of appeals granted a petition for rehearing and remanded this case to the Board "so that a properly constituted panel can resolve this dispute."

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[2]

The Board has considered the judge's decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order to the extent and for the reasons stated in the decision reported at 353 NLRB No. 84, which is incorporated herein by reference.[3]

Dated, Washington, D.C. August 12, 2010

Wilma B. Liebman,	Chairman
Peter C. Schaumber,	Member
Craig Becker,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the powers of the National Labor Relations Board in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Thereafter, pursuant to this delegation, the two sitting members issued decisions and orders in unfair labor practice and representation cases.

[2] Consistent with the Board's general practice in cases remanded from the courts of appeals, and for reasons of administrative economy, the panel includes the members who participated in the original decision. Furthermore, under the Board's standard procedures applicable to all cases assigned to a panel, the Board members not assigned to the panel had the opportunity to participate in the adjudication of this case at any time up to the issuance of this decision.

[3] We find it unnecessary to rely on *Sawgrass Auto Mall*, 353 NLRB No. 40 (2008), cited in fn. 1 of the prior decision.